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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1999

COLLEEN V. FORD,

Petitioner,

v.

SCHERING-PLOUGH CORPORATION;
SCHERING CORPORATION;
METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Petitioner, Colleen V. Ford, respectfully submits this supplemental brief pursuant to U.S. Supreme Court Rule 15 to bring to this Honorable Court's attention two recent U.S. District Court cases that support petitioner's reasoned interpretation of the ADA, and stand in contrast to the decision by the Third Circuit below.

POINT I

RECENT DISTRICT COURT CASE LAW CONSTRUING TITLE III OF THE ADA TO PROHIBIT DISCRIMINATION IN THE CONTENTS OF INSURANCE POLICIES IS ENTIRELY CONSISTENT WITH THE ADA'S INTENT

Two recent district court decisions supplement Petitioner's arguments, contained in pages four through fourteen of her petition for a writ of certiorari, that the remedial intent of Title III of the ADA applies to insurance policies.

In Doe v. Mutual of Omaha Ins. Co., 999 F. Supp. 1188, 1194 (N.D. Ill. 1998), the court joined "a growing number of district courts across the nation that have found Title III's scope to encompass review of the substance of insurance policies." (See Exhibit A). In doing so, the court rejected the Parker en banc majority's narrow interpretation of Title III as such a construction belies the statute's plain language. See id. at 1192-93. The court reasoned that this plain language, read together with the relevant ADA legislative history and DOJ

interpretive guidance, clearly supported the conclusion that Title III of the ADA cannot be restricted to the physical access of a building, but may properly be construed to apply to the content of defendant's insurance policies. Id. at 1194.

Similarly, Winslow v. IDS Life Ins. Co., 1998 WL 852876 at *6, (D. Minn. September 30, 1998), the court held that Title III was "applicable to [long-term disability] insurance policies and not limited to access to actual physical structures," basing its decision on "the legislative history, the DOJ interpretation of Title III of the ADA and the reasoning adopted by a growing number of district courts." (See Exhibit B). The court took special note of the fact that the ADA's statutory language relating to the enjoyment of goods and services would be rendered irrelevant if Title III were held to apply only to physically accessing public accommodations, or structures. See Id. at *5.

Both Doe and Winslow demonstrate that Parker, as followed by the Third Circuit below, stands for principles contrary to those which the ADA seeks to advance. Indeed, Winslow points out the unmistakable split between Parker's construction, and that which was followed by the First Circuit in Carparts. Due to this split in the circuits, together with the growing number of district courts that flatly reject the Parker en banc majority holding, (and, therefore, the Third

Circuit's decision below) this Honorable Court is presented with the opportunity to address these ADA issues in order to settle the law in this increasingly litigated area of controversy.

POINT II

RECENT DISTRICT COURT CASE LAW CONFIRMS THAT THE ADA APPLIES TO THE INSURANCE INDUSTRY, AND THAT AN INSURER MUST JUSTIFY ANY DISABILITY-BASED INSURANCE DISTINCTION WITH COMPETENT EVIDENCE

Supplementing Petitioner's arguments in pages twenty-one through twenty-nine of her petition for a writ of certiorari, both Doe and Winslow held that the ADA specifically relates to the insurance industry, and that any disability-based insurance policy distinction must be justified through sound actuarial principles, reasonably anticipated experience, or bona fide risk classifications. See 999 F. Supp. at 1195; 1998 WL 852876 at *9.

In Doe, the court rejected the defendant insurance company's argument that Congress intended to broadly exempt insurance companies from the reach of the ADA, finding that § 5.01(c)'s safe harbor provision manifested the contrary intent to subject insurance companies to the full scope of the ADA's anti-discrimination prohibitions. See 999 F. Supp. at 1195. The court stated that the defendant insurance company could prove its compliance with the ADA by demonstrating that caps placed on AIDS and AIDS-related conditions in plaintiff's

policies "were consistent with sound actuarial principles, reasonably anticipated experience, or bona fide risk classification." Id. Likewise, the court in Winslow stressed the importance of insurance companies justifying any disability-based distinction in their policies, holding that summary judgment was inappropriate and that a genuine issue of material fact existed as to whether defendant's insurance policy, which denied coverage to employees on the basis of mental disability, conformed to sound actuarial principles, claims experience, or substantial data as required under Minnesota law. See id. at *9.

The well reasoned conclusions of these district courts, as well as the authority cited therein, illustrates the effect of the Third Circuit's decision in this case to effectively insulate insurer's discriminatory practices from the reach of the ADA. In light of these common sense applications of the ADA's provisions to dubious insurance industry distinctions, petitioner respectfully requests that this Honorable Court grant her petition, reverse the Third Circuit, and remand this case with instructions that defendant MetLife justify its long-term disability insurance distinction between mental and physical disabilities with competent evidence.

CONCLUSION

For the reasons set forth above, as well as the reasons set forth in her petition, Petitioner Colleen V. Ford respectfully requests that this Court grant her petition for a Writ of Certiorari.

Respectfully submitted,

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DATED: January 6, 1999

John DOE and Richard Smith, Plaintiffs,
v.
MUTUAL OF OMAHA INSURANCE COMPANY, Defendant.

No. 98 C 0325.

United States District Court,
N.D. Illinois,
Eastern Division.

April 3, 1998.

Insureds sued medical insurer for violations of Americans with Disabilities Act and state law in capping medical insurance policy benefits for medical care of Acquired Immune Deficiency Syndrome (AIDS) or AIDS Related Conditions (ARC). On insurer's motion to dismiss, the District Court, Conlon, J., held that: (1) prohibition against disability discrimination in places of public accommodation under ADA applied to medical insurer's issuance to individuals of policies capping benefits for medical care of AIDS or ARC; (2) McCarran-Ferguson Act's antipreemption rule did not preclude application to insurance policies of prohibition against disability discrimination in places of public accommodation under ADA; (3) allegations of differential treatment under medical insurance policy provisions capping benefits for medical care of AIDS or ARC stated a cognizable claim of discrimination; and (4) private right of action would not be implied under state statute prohibiting disability discrimination in accident or health insurance policies.

Motion granted in part and denied in part.

[1] CIVIL RIGHTS ⚭119.1
78k119.1
Prohibition against disability discrimination in places of public accommodation under Americans with Disabilities Act (ADA) is concerned with more than equal access to goods and services, and it covers the discriminatory denial of an opportunity to benefit from or enjoy equally the goods and services of a public accommodation. Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

[2] CIVIL RIGHTS ⚭119.1
78k119.1
Prohibition against disability discrimination in places of public accommodation under Americans with Disabilities Act (ADA) applied to a medical insurer's issuance to individuals of medical insurance policies capping benefits for medical care of Acquired Immune Deficiency Syndrome (AIDS) or AIDS Related Conditions (ARC). Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

[2] INSURANCE ⚭1523
217k1523
Prohibition against disability discrimination in places of public accommodation under Americans with Disabilities Act (ADA) applied to a medical insurer's issuance to individuals of medical insurance policies capping benefits for medical care of Acquired Immune Deficiency Syndrome (AIDS) or AIDS Related Conditions (ARC). Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

[2] INSURANCE ⚭2522
217k2522
Prohibition against disability discrimination in places of public accommodation under Americans with Disabilities Act (ADA) applied to a medical insurer's issuance to individuals of medical insurance policies capping benefits for medical care of Acquired Immune Deficiency Syndrome (AIDS) or AIDS Related Conditions (ARC). Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

[3] STATUTES ⚭219(6.1)
361k219(6.1)
Statutory interpretation in Department of Justice's Americans with Disabilities Act Title III Technical Assistance Manual must be given deference, unless interpretation is arbitrary, capricious, or clearly contrary to the statute. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[4] CIVIL RIGHTS ⚭119.1
78k119.1
Americans with Disabilities Act (ADA) provides insurers with "safe harbor" exemption from public accommodations provisions of ADA so long as their underwriting decisions or risk classification accord with sound actuarial principles, reasonably

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anticipated experience, or bona fide risk classification, and do not otherwise constitute a subterfuge to evade the purposes of the ADA. Americans with Disabilities Act of 1990, § 501(c), 42 U.S.C.A. § 12201(c).

[4] INSURANCE ⚖1518
217k1518
Americans with Disabilities Act (ADA) provides insurers with "safe harbor" exemption from public accommodations provisions of ADA so long as their underwriting decisions or risk classification accord with sound actuarial principles, reasonably anticipated experience, or bona fide risk classification, and do not otherwise constitute a subterfuge to evade the purposes of the ADA. Americans with Disabilities Act of 1990, § 501(c), 42 U.S.C.A. § 12201(c).

[5] INSURANCE ⚖1109
217k1109
McCarran-Ferguson Act's antipreemption rule, which generally prohibits federal statutes from preempting state insurance laws, did not preclude application to insurance policies of prohibition against disability discrimination in places of public accommodation under Title III of Americans with Disabilities Act (ADA); insurers' "safe harbor" exemption from ADA's public accommodations provisions specifically related to the business of insurance within meaning of exception to antipreemption rule, and there was no conflict between ADA and state statute, which likewise prohibited disability discrimination in insurance policies. Americans with Disabilities Act of 1990, § § 302(a), 501(c), 42 U.S.C.A. §§ 12182(a), 12201(c); McCarran-Ferguson Act, § 2(b), 15 U.S.C.A. § 1012(b); S.H.A. 215 ILCS 5/364.

[5] STATES ⚖18.41
360k18.41
McCarran-Ferguson Act's antipreemption rule, which generally prohibits federal statutes from preempting state insurance laws, did not preclude application to insurance policies of prohibition against disability discrimination in places of public accommodation under Title III of Americans with Disabilities Act (ADA); insurers' "safe harbor" exemption from ADA's public accommodations provisions specifically related to the business of insurance within meaning of exception to antipreemption rule, and there was no conflict between ADA and state statute, which likewise prohibited disability discrimination in insurance policies. Americans with Disabilities Act of 1990, § § 302(a), 501(c), 42 U.S.C.A. §§ 12182(a), 12201(c); McCarran-Ferguson Act, § 2(b), 15 U.S.C.A. § 1012(b); S.H.A. 215 ILCS 5/364.

[6] CIVIL RIGHTS ⚖118
78k118
Insureds' allegations of differential treatment under medical insurance policy provisions capping benefits for medical care of Acquired Immune Deficiency Syndrome (AIDS) or AIDS Related Conditions (ARC) stated a cognizable claim of discrimination in violation of Title III of the Americans with Disabilities Act (ADA). Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

[6] INSURANCE ⚖1523
217k1523
Insureds' allegations of differential treatment under medical insurance policy provisions capping benefits for medical care of Acquired Immune Deficiency Syndrome (AIDS) or AIDS Related Conditions (ARC) stated a cognizable claim of discrimination in violation of Title III of the Americans with Disabilities Act (ADA). Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

[6] INSURANCE ⚖2522
217k2522
Insureds' allegations of differential treatment under medical insurance policy provisions capping benefits for medical care of Acquired Immune Deficiency Syndrome (AIDS) or AIDS Related Conditions (ARC) stated a cognizable claim of discrimination in violation of Title III of the Americans with Disabilities Act (ADA). Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

[7] INSURANCE ⚖3540
217k3540
Private right of action would not be implied under state statute prohibiting disability discrimination in accident or health insurance policies; primary concern of statute was direct regulation of insurance industry, and creation of right of action would not be necessary to effectuate statutory purposes. S.H.A. 215 ILCS 5/364.

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MEMORANDUM OPINION AND ORDER

CONLON, District Judge.

John Doe ("Doe") and Richard Smith ("Smith") ("plaintiffs") bring a two count complaint against Mutual of Omaha Insurance Company ("Mutual"). [FN1] The claims arise from plaintiffs' purchase of individual health insurance policies from Mutual. Count I alleges disability discrimination in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq. Count II alleges a violation of Section 364 of the Illinois Insurance Code ("IIC"), 215 ILCS 5/364. Mutual moves to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6). Plaintiffs filed a timely response. The Department of Justice ("DOJ") also filed a response brief for the United States as amicus curiae.

> FN1. In order to protect plaintiffs' privacy, the court granted leave to proceed anonymously under the fictitious names "John Doe" and "Richard Smith." See Order, No. 98 C 0325 (N.D.Ill. Feb.19, 1998).

BACKGROUND

For purposes of a motion to dismiss, the court accepts all well-pleaded allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiff. Travel All Over The World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1429 (7th Cir.1996). Plaintiffs are Chicago residents infected with the human immunodeficiency virus ("HIV"). Mutual is a Nebraska corporation with its principal place of business in Omaha, Nebraska. Mutual offers and sells its insurance directly to members of the public at various office locations.

Both Doe and Smith hold Mutual health insurance policies that place significant limits on the amount of benefits available to individuals suffering from Acquired Immune Deficiency Syndrome (AIDS) or AIDS Related Conditions (ARC) ("AIDS/ARC caps"). Doe's policy limits recoverable benefits to a lifetime maximum of $100,000. Smith's policy limits recoverable benefits to a lifetime maximum of $25,000. By contrast, each policy provides benefits for other medical care up to a lifetime maximum of $1,000,000. In addition, for medical conditions other than AIDS and ARC, Mutual will reinstate the million dollar maximum benefit and pay additional claims on the policy after the limit is reached, provided the insured does not incur any expenses for two consecutive calendar years.

Plaintiffs allege a number of ways the AIDS/ARC caps impact their ability to obtain continued medical care. According to medical guidelines published by the National Institutes of Health, HIV infection is best treated through early medical intervention, including antiretroviral therapies and related care aimed at reducing the levels of HIV in the body. Because Mutual considers expenses related to any treatment or care for HIV infection as part of the insured's lifetime maximum benefit for AIDS or ARC, the benefits caps adversely affect plaintiffs' ability to obtain the recommended medical care, including the initiation and continuation of antiretroviral therapies and related treatment. In particular, the AIDS/ARC caps ***1191** place plaintiffs at substantial risk of exhausting their coverage in the near future. Once plaintiffs have reached the policy limits, they will be left without insurance benefits for all medical treatment related to AIDS or ARC. Thus, the policy caps not only impair the plaintiffs' ability to make treatment decisions, but pose the risk of jeopardizing plaintiffs' health by forcing an untimely interruption in medical treatment.

In Count I, plaintiffs allege that Mutual's policy caps on AIDS and ARC benefits violate the ADA's prohibition against discrimination on the basis of a disability because they deny plaintiffs the opportunity to participate in and benefit from the

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$1,000,000 lifetime maximum and potential reinstatement of benefits provided to insureds with other medical conditions. Count II alleges a violation of Section 364 of the IIC based on Mutual's inability to support its coverage distinctions with reference to sound actuarial principles and actual experience. 215 ILCS 5/364. Mutual moves to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6).

DISCUSSION

I. Motion to Dismiss Standards

In ruling on a motion to dismiss, the court considers "whether relief is possible under any set of facts that could be established consistent with the allegations." Bartholet v. Reishauer A.G., 953 F.2d 1073, 1078 (7th Cir.1992) (citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). A claim may be dismissed only if it is beyond doubt that under no set of facts would a plaintiff's allegations entitle him to relief. Travel All Over The World, Inc., 73 F.3d at 1429 (7th Cir.1996); Venture Associates Corp. v. Zenith Data Systems Corp., 987 F.2d 429, 432 (7th Cir.1993) (citing Beam v. IPCO Corp., 838 F.2d 242, 244 (7th Cir.1988)). The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide its merits. Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir.1990).

II. Scope of Title III of the ADA

This case presents a novel threshold issue of statutory interpretation under Title III of the ADA. [FN2] The issue is whether Title III's prohibition against unlawful discrimination extends to the content of insurance policies offered directly through an insurer. Title III's general anti-discrimination provision is found in § 302(a) of the ADA. 42 U.S.C. § 12182(a). The provision reads:

> No individual shall be discriminated against based on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). [FN3] In Mutual's view, the plain language of this provision dictates that Title III regulates only access to goods and services offered by places of public accommodation, as opposed to the content of the goods and services themselves. According to Mutual's interpretation, since plaintiffs indisputably enjoyed equal access to the same health insurance policies available to any other individual (disabled or non-disabled) their ADA claim fails as a matter of law.

FN2. For purposes of this motion, Mutual assumes asymptomatic HIV positive status constitutes a disability as defined by the ADA. Mutual notes, however, that appellate courts are divided on this issue. Compare Runnebaum v. NationsBank of Maryland, 123 F.3d 156 (4th Cir.1997) with Abbott v. Bragdon, 107 F.3d 934 (1st Cir.1997), cert. granted, --- U.S. ----, 118 S.Ct. 554, 139 L.Ed.2d 396 (1997). This issue is therefore not properly before the court.

FN3. "Insurance offices" are included in Title III's list of "private entities that are considered public accommodations." 42 U.S.C. § 12181(7)(F).

Plaintiffs offer an alternative interpretation of the plain language of § 302(a) of the ADA and of the intended scope of Title III. Plaintiffs assert that Mutual's restrictive reading of the statutory text would render meaningless § 302(a)'s requirement that persons with disabilities be accorded "full and equal enjoyment" of facilities, goods, services, privileges, or advantages of public accommodations. Limiting the reach of § 302(a) to denials of access, as Mutual suggests, misreads the text because one can only enjoy something after gaining access. Plaintiffs find additional support for this broad interpretation of Title III in the text of § 302(b). The subsection states, in relevant part:

> ***1192** It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class ... with the opportunity to participate in or benefit from a good, service, facility, privilege or advantage, or accommodation that is not equal to that afforded to other individuals.

42 U.S.C. § 12182(b)(1)(A)(ii). In plaintiffs' view, the text of this subsection confirms that Title III of the ADA is concerned with more than just equal access. Instead, Title III of the ADA reaches the discriminatory denial of an opportunity to benefit from or enjoy equally the goods and services of a public accommodation. [FN4]

FN4. The DOJ shares plaintiffs' interpretation of

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the reach of Title III.

Mutual relies on Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir.1997) (en banc), cert. denied, --- U.S. ----, 118 S.Ct. 871, 139 L.Ed.2d 768 (1998) and Leonard F. v. Israel Discount Bank of New York, 967 F.Supp. 802 (S.D.N.Y.1997) as authority for its narrow interpretation of Title III's scope. In Parker, an en banc panel of the Sixth Circuit addressed whether Title III of the ADA prohibits an employer from providing a long term disability plan that distinguishes between mental and physical disorders in the amount of available benefits. The long term disability plan was challenged as discriminatory because it provided substantially lesser benefits to individuals suffering from mental disabilities, than it did to individuals suffering from physical disabilities. The Sixth Circuit held that "the provision of a long- term disability plan by an employer and administered by an employer and administered by an insurance company does not fall within the purview of Title III [of the ADA]." 121 F.3d at 1014. In arriving at this holding, the Sixth Circuit stated "[t]he applicable regulations clearly set forth that Title III regulates the availability of the goods and services the place of public accommodation offers as opposed to the contents of the goods and services offered by the public accommodation." Id. at 1012. Mutual argues this language supports its restrictive reading of Title III's statutory scope.

The district court in Leonard F. addressed a nearly identical ADA challenge to that addressed in Parker. Plaintiff argued that the two year limitation for mental disorders provided by his employer's disability insurance plan was discriminatory. The first section of the court's opinion concluded that plaintiff could not state a discrimination claim against his employer under Title III of the ADA. In reaching this conclusion, the court disapproved of plaintiff's argument, in reliance on the First Circuit's decision in Carparts Distribution Center v. Automotive Wholesaler's Ass'n of New England, 37 F.3d 12, 17-18 (1st Cir.1994), that Title III applies to "more than mere places, in the sense of physical structures." Id. at 804. The district court rejected the First Circuit's ruling because "[this] decision, which is not binding precedent in this Court, is essentially dictum which flies in the face of the plain meaning of Title III and is not supported by the legislative history." Id. Mutual asserts the above-quoted language supports its argument that Title III does not cover the content of insurance policies.

In contrast, plaintiffs find support for their broader interpretation of the scope of Title III in Chabner v. United of Omaha Life Ins. Co., 994 F.Supp. 1185 (N.D.Cal.1998) and World Ins. Co. v. Branch, 966 F.Supp. 1203 (N.D.Ga.1997). In Chabner, a plaintiff who suffered from physical disabilities sued an insurer under various state statutes and Title III of the ADA. Plaintiff alleged discrimination under the ADA because the cost of his whole life insurance policy was nearly double the rate charged to non-disabled individuals during the same period of time. At the outset of its opinion on the insurer's motion for summary judgment, the court directly addressed whether Title III applies to insurance underwriting practices. The insurer argued that the scope of Title III of the ADA covers only discrimination in the physical access to goods and services. The court rejected this argument and held that the plain language of Title III and relevant legislative history supported its application to insurance underwriting practices. 994 F.Supp. at 1188-93. Otherwise, the court reasoned, Title III's prohibitions providing for equal access to goods and services, 42 U.S.C. § 12182(b)(1)(A)(ii), and requiring "reasonable *1193 modifications in policies, practices or procedures ... necessary to afford such goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities" would be rendered superfluous, 42 U.S.C. § 12182(b)(1)(A)(ii). Id. at 1190.

The district court in World Insurance Company addressed the applicability of Title III to an insurance policy provision, like the Mutual policies at issue here, that caps lifetime coverage for AIDS treatment. 966 F.Supp. at 1207. The court first surveyed district court cases applying Title III to the content of insurance policies in related contexts. The court then examined the legislative history of the ADA. Finally, the court concluded that Title III applied to the insurer's decision to limit the maximum benefit for AIDS related treatment to $5,000. Id. at 1208-09.

[1] This court finds the Parker and Leonard F. courts' limitation on the scope of Article III neither controlling nor persuasive. Contrary to Mutual's suggestion, limitation of Title III's scope to the question of discriminatory access is at odds with the

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plain language of Title III, relevant legislative history and the Department of Justice's interpretative guidance. As an initial matter, the plain language of Title III's anti-discrimination provisions nowhere indicates that Title III's scope is limited to questions of access. Indeed, in order to arrive at the restrictive interpretation of Title III that Mutual advances, the Parker court relied on the language of the ADA regulations. The Parker court did not comment on the statutory text. The plain language of 42 U.S.C. § 12182(a), (b)(1)(A)(i), (b)(1)(A)(ii) and (b)(1)(A)(iii) belies the Parker court's narrow conclusion. Title III is patently concerned with more than just access to the goods and services offered by places of public accommodation. Rather, the plain language of Title III manifests a Congressional intent to ensure "full and equal enjoyment" of the goods and services themselves and an equal opportunity to "participate in or benefit from" goods or services offered by a place of public accommodation. 42 U.S.C. § 12182(a), (b)(1)(A)(ii); see Doukas v. Metropolitan Life Ins. Co., 950 F.Supp. 422, 426 (D.N.H.1996) ("The broad wording and diversity of [§ 12182's] 'specific prohibitions,' are a strong indication that Title III was intended to extend beyond mere access or availability of a good or service.").

[2] Applying these provisions, Mutual's insurance policy is plainly one of the "goods, services, ... privileges [or] advantages" offered by an insurance office. See Doukas, 950 F.Supp. at 426. It follows that, Mutual's policy caps for AIDS and ARC could plausibly constitute discrimination under any one of Title III's specific prohibitions. The AIDS/ARC caps could alternately be viewed as a discriminatory denial of the "full and equal enjoyment" of goods or a service; as a discriminatory denial of an equal opportunity to benefit from goods or a service; as the discriminatory denial of an opportunity to benefit from goods or a service; or as the provision of goods or a service different from that provided to others. § 12182(a), (b)(1)(A)(i), (b)(1)(A)(ii), (b)(1)(A)(iii). To limit the scope of Title III to denials of access would effectively render the statutory language meaningless. See Chabner, 994 F.Supp. at 1190. Thus, to give full effect to Title III's plain language, it must be deemed applicable to the content of insurance policies.

The legislative history of the ADA also confirms the applicability of Title III to the substance of insurance policies. In particular, the text of both House and Senate reports acknowledges the applicability of the ADA's anti- discrimination provisions to insurance policies. For example, one House report states, in pertinent part:

> [W]hile a plan which limits certain kinds of coverage based on classification of risk would be allowed under [Section 501(c)], the plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

H.R.Rep. No. 101-485, pt. 2, at 136-37 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 419-20. Similarly, the Senate report stated:

> ***1194** virtually all states prohibit unfair discrimination among persons of the same class and equal expectation of life. The [ADA] adopts this prohibition of discrimination. Under the [ADA], a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.

S. Rep. No. 101-116 at 84 (1989). Thus, the legislative history illustrates that Congress contemplated application of the ADA to insurance policies. [FN5]

> FN5. Other district courts have relied on similar sections of the ADA's legislative history to support the application of Title III to insurance policies. See, e.g., Chabner, at 1190; World Insurance, 966 F.Supp. at 1208.

[3] Finally, the DOJ's interpretative guidance provides persuasive support for the conclusion that Title III applies to the content of insurance policies. The DOJ's interpretations of Title III are expressed in both the regulations and the technical assistance manual. [FN6] For example, the DOJ has concluded that the ADA "reach[es] insurance practices by prohibiting differential treatment of individuals with disabilities in insurance offered by public accommodations unless the differences are justified." 28 C.F.R. ch.1, pt. 36, App. B at 619 (1996). Similarly, the DOJ's technical assistance manual states:

> FN6. Congress has delegated to the DOJ the

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authority to promulgate binding regulations, 42 U.S.C. § 12186(b), and to issue a technical assistance manual providing guidance about the ADA's requirements, 42 U.S.C. § 12206(c)(3). In view of this express delegation of authority, the DOJ's regulations must be given "legislative and hence controlling weight, unless they are arbitrary, capricious, or clearly contrary to the statute." United States v. Morton, 467 U.S. 822, 834, 104 S.Ct. 2769, 81 L.Ed.2d 680 (1984). The technical assistance manual is entitled to similar deference. See, e.g., Innovative Health Sys. v. City of White Plains, 117 F.3d 37, 45 n. 8 (2d Cir.1997).

> Insurance offices are places of public accommodation and, as such, may not discriminate on the basis of disability in the sale of insurance contracts or in the terms or conditions of the insurance contracts they offer.

Title III Technical Assistance Manual § III-3.11000 (Nov.1993). Thus, the DOJ has consistently interpreted Title III as applicable to insurance policies.

In summary, Title III of the ADA applies to the content of Mutual's insurance policies. In reaching this conclusion, this court joins a growing number of district courts across the nation that have found Title III's scope to encompass review of the substance of insurance policies. See, e.g., Chabner, 994 F.Supp. at 1190; Lewis v. Aetna Life Ins. Co., 982 F.Supp. 1158, 1163-65 (E.D.Va.1997); World Insurance Co., 966 F.Supp. at 1207-08; Cloutier v. Prudential Ins. Co., 964 F.Supp. 299, 301-02 (N.D.Cal.1997); Doukas, 950 F.Supp. at 425-26; Kotev v. First Colony Life Ins. Co., 927 F.Supp. 1316, 1321-22 (C.D.Cal.1996); Anderson v. Gus Mayer Boston Store of Delaware, 924 F.Supp. 763, 779 (E.D.Tex.1996); Baker v. Hartford Life Ins. Co., No. 94 C 4416, 1995 WL 573430, *3 (N.D.Ill. Sept.28, 1995). The contrary conclusion Mutual urges would undermine the plain language of Title III, and disregards legislative history as well as the compelling guidance of the DOJ.

III. Title IV of the ADA

Mutual next points to § 501(c) of Title IV of the ADA as proof of Congress' intent to curtail the reach of Title III to insurance policies. Section 501(c) provides, in relevant part:

> Subchapters I through III of this chapter and Title IV of this Act shall not be construed to prohibit or restrict--
>
> (1) an insurer ... from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law;
>
> ....
>
> Paragraph[ ](1) ... shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter.

42 U.S.C. § 12201. Mutual contends § 501(c) establishes a rule of construction. According to Mutual, § 501(c) exhibits Congress' intent to prohibit any construction of Article III that would impose an affirmative obligation on insurance companies to design policies in a certain way. By contrast, plaintiffs argue the inclusion of § 501(c) only reinforces the conclusion that Title III reaches the content of insurance policies.

***1195** [4] Plaintiffs' view of § 501(c) is in line with the predominant weight of authority. Section 501(c) has been commonly construed as a form of "safe harbor" provision for insurance companies. See, e.g., Modderno v. King, 82 F.3d 1059, 1063-64 (D.C.Cir.1996); Chabner, at 1190; Lewis, 982 F.Supp. at 1165-1166; World Insurance Co., 966 F.Supp. at 1207-08; Kotev, 927 F.Supp. at 1322. Under this safe harbor, the challenged underwriting practice or risk classification does not violate the ADA if it accords with "sound actuarial principles, reasonably anticipated experience, or bona fide risk classification," or does not otherwise constitute a "subterfuge to evade the purposes of the ADA." World Insurance Co., 966 F.Supp. at 1208, 1209 n. 6. Rather than signaling Congress' intent to broadly exempt insurance companies from the reach of Title III of the ADA, § 501(c)'s safe harbor provision manifests the contrary intent to subject insurance companies to the full scope of the ADA's anti-discrimination prohibitions. See Chabner, at 1190 ("If Title III were meant only to prevent insurance companies from denying persons with disabilities equal access to the physical plants of insurance offices, there would have been no need for Congress to include the safe harbor provision dealing with underwriting practices."); see also Kotev, 927 F.Supp. at 1322 (insurers would not need "this 'safe harbor' provision ... if insurers could never be liable under Title III for conduct such as the discriminatory denial of insurance coverage"). Mutual may later avail itself of § 501(c)'s safe harbor by demonstrating the caps placed on AIDS and ARC in plaintiffs' policies were consistent with

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sound actuarial principles, reasonably anticipated experience, or bona fide risk classification. However, § 501(c) does not support Mutual's argument that Title III of the ADA does not reach the content of insurance policies.

IV. The McCarran-Ferguson Act

[5] Mutual next argues that a straightforward application of the McCarran-Ferguson Act, 15 U.S.C. § 1012 et seq., precludes application of the ADA to insurance policy content. The McCarran-Ferguson Act provides, in relevant part, that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Under McCarran-Ferguson, unless a federal statute clearly provides otherwise, it must be construed as inapplicable to the business of insurance. See, e.g., U.S. Dept. of Treasury v. Fabe, 508 U.S. 491, 507, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993); Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 116 S.Ct. 1103, 1113, 134 L.Ed.2d 237 (1996). In essence, Mutual argues that Title III of the ADA does not satisfy this clear statement test. In particular, Mutual asserts that the only mention of insurance in Title III is the reference to "insurance office" in 42 U.S.C. § 12181(7). Mutual contends this minor reference does not exhibit the necessary intent to regulate the content of insurance policies, business or practices.

In response, plaintiffs and the DOJ argue that McCarran-Ferguson does not preclude application of Title III to the content of insurance policies. Mutual fails to demonstrate McCarran-Ferguson bars application of Title III to the content of its insurance policies for the two independent reasons pressed by plaintiffs and the DOJ. First, § 501(c) expressly provides that insurance underwriting practices shall not be used to evade the purposes of Title III. In this manner, the ADA "specifically relates to the business of insurance" for purposes of the McCarran-Ferguson Act. § 1012(b); see Barnett Bank, 116 S.Ct. at 1111-1113. In arguing to the contrary, Mutual limits its clear statement inquiry to the language of Title III. The question is whether the ADA as a whole contains sufficient specific references to the insurance industry, not whether a specific title within the ADA contains such references. Taking into account both the reference to "insurance office" in Title III and the language of § 501(c) in Title IV, the ADA contains sufficiently specific indicia of an intent to apply its prohibitions to the insurance underwriting practices.

Second, Mutual has not identified any state law that an application of Title III of the ADA would "invalidate, impair, or supersede." *1196 § 1012(b). Indeed, as plaintiffs note, Illinois insurance law consistently forbids Mutual's alleged discriminatory practice:

> No company, in any policy of accident or health insurance issued in this State, shall make or permit any distinction or discrimination against individuals solely because of handicaps or disabilities ... in the amount of any dividends or other benefits payable thereon, or in any other terms and conditions of the contract it makes, except where the distinction or discrimination is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

215 ILCS 5/364 (West 1997) (emphasis added). Where there is no conflict between the federal statute and state law, as in this case, the McCarran-Ferguson Act does not bar application of federal law. See, e.g., Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1363 (6th Cir.1995), cert. denied, 516 U.S. 1140, 116 S.Ct. 973, 133 L.Ed.2d 893 (1996); Merchants Home Delivery Serv. Inc. v. Frank B. Hall & Co., 50 F.3d 1486, 1491-93 (9th Cir.), cert. denied, 516 U.S. 964, 116 S.Ct. 418, 133 L.Ed.2d 335 (1995); NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 295-97 (7th Cir.1992). Accordingly, application of Title III of the ADA to Mutual's policies is not precluded by the McCarran-Ferguson Act.

V. ADA Discrimination

[6] Mutual argues that AIDS/ARC caps do not constitute discrimination against individuals "on the basis of a disability," 42 U.S.C. § 12182(a), because they are a permissible distinction in the level of benefits provided to one category of disability as differentiated from other categories. Mutual finds support for this argument in a trio of appellate decisions addressing challenges under the ADA and the Rehabilitation Act, 29 U.S.C. § 794, to employer health benefit plans or long term disability plans that provide inferior benefits for mental disabilities, as compared to physical disabilities.

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See, e.g., EEOC v. CNA Ins. Cos., 96 F.3d 1039 (7th Cir.1996); Modderno v. King, 82 F.3d 1059 (D.C.Cir.1996); Parker, 121 F.3d 1006. These cases uniformly reject the notion that providing unequal benefits as between the broad categories of mental and physical disabilities constitutes cognizable discrimination. EEOC, 96 F.3d at 1044; Modderno, 82 F.3d at 1061; Parker, 121 F.3d at 1015-16. In sum, Mutual urges that because its policies similarly provided different levels of benefits for different disabilities the AIDS/ARC caps are not discriminatory under the ADA.

Mutual's attempt to make plaintiffs' claim fit the rule of EEOC, Parker, and Modderno fails because these cases are inapposite. Unlike the claims in each of those cases, the ADA claim in this case focus on Mutual's singling out of individuals with a particular disability, AIDS, for inferior coverage as compared to that afforded non-disabled individuals. Indeed, the Parker court specifically distinguished differentiation between broad categories of individuals with different disabilities from the discrimination prohibited by the ADA--discrimination between the disabled and non-disabled. 121 F.3d at 1014. Similarly, the Seventh Circuit distinguished its decision from a case where an insurer chooses "to vary the terms of its plan depending on whether the employee was disabled." EEOC, 96 F.3d at 1044. The alleged discrimination at issue here is well-illustrated by plaintiffs' hypothetical example. Mutual will provide coverage of up to $1 million dollar for hospitalizations related to pneumonia for non-disabled individuals. Whereas if the pneumonia presents itself as a complication of AIDs, it is deemed an aids related condition (ARC) and subject to the AIDS/ARC cap. If, for instance, Smith had already exhausted his $25,000 dollar limit for AIDS related care, he would be denied coverage for pneumonia treatment. A non-disabled individual who had not reached the $1 million dollar cap would not be denied coverage. Further, even if that non-disabled individual had exhausted his $1 million dollar maximum, he would be entitled to a reinstatement of benefits, provided he did not incur any expenses for two consecutive calendar years. The same reinstatement benefit is not provided to disabled persons after exhaustion of the AIDS/ARC cap. This example exposes the discriminatory nature of Mutual's policies--they subject plaintiffs to altogether different terms and conditions than non-disabled individuals. In sum, plaintiffs' allegations of differential treatment on the basis of AIDS are sufficient to state a *1197 cognizable claim of discrimination in violation of Title III of the ADA.

VI. Section 364 of the Illinois Insurance Code

In Count II, plaintiffs seek to state a claim for violation of § 364 of the Illinois Insurance Code. 215 ILCS 5/364. As noted above (see part IV), § 364 provides:

> No company, in any policy of accident or health insurance issued in this State, shall make or permit any distinction or discrimination against individuals solely because of handicaps or disabilities ... in the amount of any dividends or other benefits payable thereon, or in any other terms and conditions of the contract it makes, except where the distinction or discrimination is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

215 ILCS 5/364 (West 1997) (emphasis added). Conceding that the Illinois legislature has not seen fit to provide a private remedy for violations of this section of the IIC, plaintiffs argue that this court should find an implied right of action under the statute.

[7] Plaintiffs argue that an implied right of action should be found under the rationale expressed in Sawyer Realty Group, Inc. v. Jarvis Corp., 89 Ill.2d 379, 59 Ill.Dec. 905, 432 N.E.2d 849, 854-855 (1982). In Sawyer the Illinois Supreme Court articulated the following elements useful to the determination whether there is an implied right of action under a state statute:

1. The plaintiff is a member of the class of persons for whose benefit the statute was enacted;
2. The plaintiff's injury is one which the statute was designed to prevent;
3. A private right of action is consistent with the underlying purpose of the statute; and
4. A private right of action is necessary to effectuate the purposes of the act.

See id. Except perhaps for the first element, none of the other Sawyer elements counsels in favor of finding an implied right of action. Although the IIC benefits insurance customers, its primary concern is direct regulation of the insurance industry. There is no authority for the proposition that the underlying purpose of IIC, in particular Article XX ("Accident and Health Insurance"), was to redress discrimination by insurers. Moreover, creation of

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an implied private cause of action under § 364 is not necessary to effectuate the statutory purposes of the IIC because it specifies remedies for the section's violation. See Langendorf v. Travelers State Ins. Co., 625 F.Supp. 1103, 1106 (N.D.Ill.1985) (no need for implied private right of action under IIC because Director of Insurance empowered to issue cease and desist orders against insurer who commits proscribed acts). For example, section 5/730 provides that "any company, or any officer or agent thereof, issuing or delivering to any person in this State any policy in wilful violation of the provision of this article shall be guilty of a petty criminal offense." 215 ILCS § 5/370(1). Further, the Director of Insurance is empowered to revoke or suspend the license of a foreign or alien company wilfully violating the article or to order payment of a monetary penalty. 215 ILCS § 5/730(2). Thus, implication of a private cause of action under § 364 is unwarranted.

In declining to recognize an implied right of action under § 364 of the IIC, the court is mindful of the fact that no Illinois court has found an implied private right of action under any provision of the Act. As courts of limited jurisdiction, federal courts are reluctant to effect dramatic expansions of state law absent indication from the state supreme court, or at the very least a clear line of state appellate court authority. See DeMent v. Abbott Capital Corp., 589 F.Supp. 1378, 1387 (N.D.Ill.1984) (refusing to imply private cause of action under the Illinois Securities Act where no Illinois court had ever held that an individual could pursue private remedies under the Act). Accordingly, plaintiffs' claim pursuant to § 364 of the IIC must be dismissed.

CONCLUSION

Plaintiffs adequately state a claim that the AIDS/ARC caps in Mutual's insurance policies constitute discrimination in violation of Title III of the ADA. In contrast, plaintiffs fail to state a claim under the IIC because this court finds no implied private right of ***1198** action. Accordingly, the motion to dismiss is granted in part and denied in part. Count II of the complaint is dismissed with prejudice. Defendant's motion is denied in all other respects.

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Exhibit B

Susan **WINSLOW**, Plaintiff,
v.
IDS LIFE INSURANCE CO., Defendants.

No. CIV. 3-96-75 MJD/AJB.

United States District Court,
D. Minnesota.

Sept. 30, 1998.

Roderick J. Macpherson III of the Minnesota Disability Center on behalf of the plaintiff.

John D. Thompson and Doreen A. Mohs of Rider, Bennett, Egan & Arundel, LLP, on behalf of the defendant.

MEMORANDUM AND ORDER

DAVIS.

*1 Susan M. Winslow filed this action for declaratory and injunctive relief and for damages under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., and the Minnesota Human Rights Act ("MHRA"), Minn.Stat. § 363.01 et seq. when she applied for and was denied long-term disability insurance by IDS Life Insurance Co. due to her current history of treatment for a mental health condition. The matter is before the Court on Defendant's motion for summary judgment which, for the foregoing reasons, is denied in part and granted in part.

BACKGROUND

On approximately October 27, 1994, Plaintiff Susan Winslow applied to IDS Life Insurance Co. for standard long-term disability insurance or, in the alternative, long-term disability insurance with a rider excluding coverage for periods of disability due to her mental health condition. Plaintiff indicated on her application that she had been treated for mental illness--dysthymia or mild depression [FN1]--within the past year and was currently taking Zoloft, an anti-depressant. IDS refused both requests for insurance based on its policy of automatically denying long-term disability insurance to applicants who report having received treatment for a mental or nervous condition, regardless of seriousness, within the twelve months prior to application. IDS policy allows such applicants to be reconsidered for long-term disability insurance after a year has passed since their last treatment for a mental or nervous condition. IDS asserts that its above-stated policy is based on industry-wide claims experience and actuarial data that indicates that the highest number of payments are made for depression-related claims. Plaintiff notes, however, that the IDS policy differs from that in the Paul Revere Underwriting Manual-a manual used by IDS in making other underwriting decisions-which does not require automatic rejection of applicants with current histories of mental or nervous conditions, such as Plaintiff's dysthymia, but instead provides for a long-term disability insurance policy with a longer exclusion period. (Plaintiff's Mem. Opp. Summ. J. at 4).

Plaintiff received notice of the denial of her long-term disability insurance application in November 1994 and requested reconsideration. In her request for reconsideration Plaintiff asserted to IDS that she had never been hospitalized or missed work due to her mental health condition and provided corroborative letters from two psychiatrists from whom she had received treatment, affirming that Plaintiff suffered only mild symptoms, which did not manifest themselves in work situations. Plaintiff also submitted to IDS letters of support from former and current employers praising her work performance. IDS received Plaintiff's additional documents, and after internal discussions, agreed that denial of Plaintiff's application was appropriate.

DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate if the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex v. Catrett, 477 U.S. 317, 322- 23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Unigroup, Inc. V. O'Rourke Storage & Transfer Co., 980 F.2d 1217, 1219-20 (8th Cir.1992); Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1315 (8th Cir.1996). The

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burden of demonstrating the absence of any genuine issue of material fact rests on the moving party. Fed.R.Civ.P. 56(b); Celotex, 477 U.S. at 323. To defeat summary judgment when a properly supported motion for summary judgment is made, however, the non-moving party must go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); Anderson, 477 U.S. at 250.

II. Disability Under the ADA

*2 In order to defeat summary judgment plaintiff Winslow must demonstrate that she is a person with a disability as defined by the ADA and therefore a plaintiff covered by the ADA. The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2)(A)-(C). Winslow does not argue that she meets criteria (A) or (B) of the ADA definition. Instead, Plaintiff asserts that IDS regarded her as disabled and treated her as having "a physical or mental impairment that substantially limits one or more of the major life activities," in this case, her future ability to work. See, Wooten v. Farmland Foods, 58 F.3d 382, 385 (8th Cir.1995), (citing 29 C.F.R. § 1630.2(1)(3)).

The relevant Equal Employment Opportunity Commission ("EEOC") regulations define "regarded as having an impairment" as:

> (i) having a physical or mental impairment that does not substantially limit major life activities but that is treated by a private entity as constituting such a limitation; (ii) having a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; (iii) having none of the impairments defined in ... [above] but treated by a private entity as having such an impairment.

Aucutt, 85 F.3d at 1319-1320 (citing 28 C.F.R § 1630.2(1)(1)-(3)). Both the ADA and EEOC regulations establish that a plaintiff, such as Winslow, whose claim asserts only that she was regarded by a defendant as having a substantially limiting impairment, need not prove that she in fact suffered such impairment. As a result, although both parties present conflicting views as to whether Winslow's dysthymia falls within the ADA definition of "impairment," this Court need not reach the question and requires only that Plaintiff demonstrate that she was "regarded as having such an impairment" by IDS, as she so asserts.

Plaintiff claims that the "major life activity" that Defendant perceives as "substantially limited" by her dysthymia is her future ability to work. It is undisputed that work is a "major life activity," which if substantially limited or regarded as substantially limited by a significant impairment qualifies a person as disabled under the ADA. Wooten. 58 F.3d at 385, (citing 29 C.F.R. § 1630.2(i)); see also Thompson v. Holy Family Hospital, 121 F.3d 537, 541 (9th Cir.1997), (citing Gordon v. E.L. Hamm & Assocs., Inc., 100 F.3d 907, 913 (11th Cir.1996)).

This Court finds, as a matter of law, that when IDS denied Plaintiff Winslow's application for long-term disability insurance based on her depression and anxiety, diagnosed as dysthymia, IDS implicitly considered her to be "impaired" and likely unable to perform "either a class of jobs or a broad range of jobs in various classes" in the future. The Court finds that although no IDS documentation explicitly indicates that Plaintiff was regarded as disabled, perceptions regarding an applicant's future inability to work are the only logical criteria upon which denial of long-term disability insurance, which insures only against the loss of income caused by the inability to work due to a disability, would be based. The Court's finding is supported by Defendant's explanation for its eligibility criteria--that highest payments are going out for claims due to mental or nervous conditions.

*3 Defendant asserts that even if Plaintiff can show that IDS regarded her as likely to suffer a substantially limiting impairment in the future, she has failed to show that IDS regarded her as disabled at the time it denied her application for long-term disability insurance as required by the statutory language of the ADA, which contains no future tense. See 42 U.S.C. § 12102(2)(C) ("regarded as having such an impairment")(emphasis added). In support of its narrow reading of the "regarded as" provision of the ADA, Defendant cites Glidden v. County of Monroe, 950 F.Supp. 73, 77 (W.D.N.Y.1997)(defendant's fear that plaintiff would suffer from a mental disability in the future did not render the ADA applicable) and Pater v. Deringer Mfg. Co., 1995 WL 530655 (N.D.Ill.)

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(the court was "not persuaded by Plaintiff's contention that the perception or fear that a future disability may occur should render the ADA applicable"). The courts in both Glidden and Pater, however, determined that plaintiffs had failed to make the threshold showing that defendants perceived that they suffered or would suffer disabilities. Therefore, determination as to whether the ADA would have applied to the defendants' hypothetical fear of a plaintiffs' future disabilities was merely dicta.

In Doukas v. Metropolitan Life Insurance Company, 1997 WL 833134 (D.N.H.), the court held that "the distinction between present and future limitations [in the ADA] is not dispositive." 1997 WL 833134 at *5. In Doukas, Plaintiff Susan Doukas applied for and was denied mortgage disability insurance by MetLife. MetLife based its denial on information in Doukas' application indicating that she had been diagnosed with and was being treated for bipolar disorder and was therefore likely to become totally disabled from work in the future. MetLife moved for summary judgment on the grounds that Doukas did not fall within the ADA definition of disabled because she was not regarded as currently disabled and incapable of working but rather as presenting a future risk of disability. The court denied MetLife's motion, finding that "the 'regarded as' definition of disability seeks to eradicate discrimination based on prejudice or irrational fear. Fear, almost by definition, refers not to actual present conditions, but to anticipated future consequences." Id. at * 4. Courts have noted that the perception of impairment is included by Congress within the definition of disabled to combat the effects of " 'archaic attitudes,' erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities." Wooten, 58 F.3d at 385 (citing School Bd. of Nassau County v. Arline, 480 U.S. 273, 279 & 285, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987)). In this light, the Doukas court noted that to limit ADA protection to instances in which the defendant regards the plaintiff's substantially limiting impairment as immediate would contradict Congressional intent and "allow an employer to refuse to hire an epileptic as long as the job applicant was not having a seizure at the time." Doukas, at *4. [FN2]

*4 This circuit has not addressed the question of whether the ADA definition of perceived impairment requires that a defendant regard a plaintiff as having a present substantially limiting impairment or whether the statute is satisfied by a defendant's perception of likely future inability to perform a major life activity. This Court finds the reasoning set forth in Doukas persuasive and holds that the purpose of the ADA requires that ADA protection extend to cover perception of possible future disability.

III. Applicability of the ADA to Insurance Policies

Title III of the ADA provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). Section 12181(7) provides an illustrative list of entities considered public accommodations for the purposes of Title III. See Parker v. metropolitan Life Ins. Co., 121 F.3d 1006, 1010 (6th Cir.1997); Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc., 37 F.3d 12, 19 (1st Cir.1994). The issue before this Court is whether "public accommodations" are limited to actual physical structures or whether Title III of the ADA prohibits more than physical impediments to public accommodations for the disabled. This issue is one of first impression for the Eighth Circuit and has been decided only by the First and Sixth Circuits, which split on the matter, and a smattering of district courts, some of which have followed the First Circuit in Carparts and others of which have adopted the reasoning of the Sixth Circuit in Parker.

In Parker, the Sixth Circuit reviewed the regulations applicable to Title III of the ADA to interpret "places" of public accommodation and found that a "place," as defined by 28 C.F.R. § 36.104, is "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the twelve 'public accommodation' categories." Parker, 121 F.3d at 1011. A "facility," in turn, is defined by 28 C.F.R. § 36.104 as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking

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lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." Parker, 121 F.3d at 1011. The court concluded that the plain meaning of the statutory language and the applicable regulations is that places of public accommodation are limited to physical places open to public access. Id. at 1011, 1014. See also Erwin v. Northwestern Mutual Life Insurance Company, 999 F.Supp. 1227, 1231 (S.D.Ind.1998); Pallozzi v. Allstate Life Insurance Company, 998 F.Supp. 204, 1998 WL 139410 at *2-*3 (N.D.N.Y.); Leonard F. v. Israel Discount Bank of New York, 967 F.Supp. 802, 805 (S.D.N.Y.1997); Pappas v. Bethesda Hosp. Ass'n, 861 F.Supp. 616, 620 (S.D.Ohio 1994).

*5 In Carparts, the First Circuit reached the opposite conclusion, determining that "public accommodations" are not limited to actual physical structures. Kotey v. First Colony Life Insurance Company, 927 F.Supp. 1316 (C.D.Cal.1996) followed the Carparts holding and addressed the issue at greater length. Kotey noted that the limited interpretation of "public accommodation" adopted by the Parker court would contravene the broadly stated purpose of the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities ... and invoke the sweep of congressional authority ... in order to address the major areas of discrimination faced day-to-day by people with disabilities ." Kotey, 927 F.Supp. at 1321 (citing 42 U.S.C. § 12101(b)(1, 4)); See also Doukas v. Metropolitan Life Insurance Company, 950 F.Supp. 422, 427 (D.N.H.1996).

"Disability" under the ADA includes both physical and mental impairments as well as those with records of or regarded as having such impairments. See 42 U.S.C. § 12102(2)(A)-(C). By restricting "public accommodations" to include only physical structures, the protection under the ADA for individuals with mental disabilities would be virtually negated, absent circumstances in which a physical structure denied access to the mentally impaired. Kotey, 927 F.Supp. at 1322.

Especially relevant to the present case is ADA statutory language that would be rendered irrelevant if Title III were held to apply only to physical access to public accommodations:

> (i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary ...
> (ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities ...
> (iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence.

42 U.S.C. § 12182(b)(2)(A)(i-iii); see also, Doe v. Mutual of Omaha Insurance Company, 999 F.Supp. 1188, 1193 (N.D.Ill.1998); Doukas, 950 F.Supp. at 426 (D.N.H.1996); Cloutier v. Prudential Ins. Co., 964 F.Supp. 299, 302 (N.D.Cal.1997); Chabner v. United of Omaha Life Insurance Company, 994 F.Supp. 1185, 1190 (N.D.Cal.1998); Kotey, 927 F.Supp. at 1322. Also rendered superfluous by such a narrow interpretation would be the Title III provision for injunctive relief set forth in 42 U.S.C. § 12188(a)(2) that "shall also include requiring the ... modification of policy."

*6 Further supporting the conclusion reached by Kotey and a growing number of district courts--that ADA Title III applies to the provision of insurance policies--is the "Safe Harbor" provision of Title III, specifically addressing insurance. If Title III were not intended to apply to insurance policies, the Safe Harbor provisions would also be superfluous. The Safe Harbor provision states, in relevant part:

> Subchapters I through III of this chapter and Title IV of this Act shall not be construed to prohibit or restrict-
> (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law;
> ...
> Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter[s] I and III of this chapter.

42 U.S.C. § 12201(c). Courts have concluded, and this Court agrees, that the Safe Harbor provision

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would be superfluous if "insurers could never be liable under Title III for conduct such as discriminatory denial of insurance coverage." Kotey, 927 F.Supp. at 1322; see also, Chabner, 994 F.Supp. at 1190-1191.

The interpretation of Title III set forth in the legislative history of the ADA as well as by the U.S. Department of Justice ("DOJ") also supports the theory that Title III of the ADA is intended to cover access to insurance policies offered by public accommodations. The DOJ interprets Title III as prohibiting "differential treatment of individuals with disabilities in insurance offered by public accommodations unless the differences are justified." Doukas, 950 F.Supp. at 427 (citing 28 C.F.R. pt. 36, subpart B, § 36.212); see also Doe v. Mutual of Omaha Insurance Company, 999 F.Supp. at 1194. Both the Senate and the House have determined that said justification must "be based on sound actuarial principles or be related to actual or reasonably anticipated experience." Kotey, 927 F.Supp. at 1323 (citing H.R.Rep. No. 485, 101st Cong., 2d Sess. at 71, U.S.C.C.A.N. at 353; S.Rep. No. 116, 101st Cong., 2nd Sess. At 84-86, U.S.C.C.A.N. at 366-369); see also Chabner, 994 F.Supp. at 1191.

Based on the legislative history, the DOJ interpretation of Title III of the ADA, and the reasoning adopted by a growing number of district courts, this Court finds that Title III of the ADA is applicable to insurance policies and not limited to access to actual physical structures.

A. The McCarran-Ferguson Act

Defendant argues that the McCarran-Ferguson Act, 15 U.S.C. § 1012 et seq., precludes application of the ADA to insurance policies because Title III is not intended to regulate the business of private insurance carriers. The McCarran- Ferguson Act provides, in relevant part:

> No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically related to the business of insurance.

*7 15 U.S.C. § 1012(b), cited in Doe v. Mutual of Omaha Insurance Company, 999 F.Supp. at 1195; Leonard, 967 F.Supp. at 805. The McCarran-Ferguson Act bars the application of a federal statute if:

> (1) the statute does not specifically relate to the business of insurance; (2) a state statute has been enacted for the purpose of regulating the business of insurance; and (3) the federal statute would invalidate, impair, or supersede the state statute.

Doe v. Norwest Bank Minnesota N.A., 107 F.3d 1297, 1305 (8th Cir.1996) (citations omitted). In Doe v. Norwest Bank Minnesota, the Eighth Circuit addressed the application of the McCarran-Ferguson Act in the context of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). In Doe v. Norwest Bank Minnesota, both parties agreed that RICO does not specifically relate to the business of insurance and that Minnesota has enacted a "comprehensive statutory scheme to regulate the business of insurance." Id at 1306. The only issue in dispute before the Eighth Circuit was therefore whether the application of RICO would "invalidate, impair, or supersede" Minnesota's insurance laws, which were parallel in substance to RICO but provided for different remedies. Id. The court noted that while relevant Minnesota law allowed only for administrative agency enforcement rather than a private cause of action and provided only for possible fines and injunctive relief, RICO expressly grants treble damages, costs, and attorney fees to victorious plaintiffs. Id at 1306. The court determined that the RICO recovery was "significantly greater than that which the state has authorized" by providing "remedies .. among the most severe ever enacted in a federal civil statute." Id. at 1306-07 (citations omitted). The cour. therefore held that because of the severity of the RICO remedies, their application to the present case would "impair" Minnesota's regulatory scheme. Id. at 1307-1308.

The present case can be distinguished from Doe v. Norwest Bank Minnesota, however, as the ADA, unlike RICO, is specifically related to the business of insurance and the ADA does not impair, invalidate, or supersede relevant Minnesota state law.

This Court identifies two fundamental provisions of the ADA that specifically relate to the business of insurance. The Court finds that the "subterfuge" provision of the ADA, see supra, 42 U.S.C. § 12201(c), which prohibits the use of the Safe Harbor provision to evade the purpose of Title III of the ADA is a statutory provision specifically related to

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the business of insurance. See Doe v. Mutual of Omaha Insurance Company, 999 F.Supp. at 1195. The Court also interprets the inclusion of an "insurance office" as an entity considered a public accommodation for the purposes of Title III of the ADA, see 42 U.S.C. § 12181(7)(F), as an explicit indication that the ADA is intended to specifically relate to the business of insurance.

*8 Even if the Court had concluded otherwise, however, the McCarran- Ferguson Act would be inapplicable to the present case. As with the RICO provisions in Doe v. Norwest Bank Minnesota, the substantive provisions of the ADA and the relevant Minnesota statutes are similar in the present case. See infra, Minn.Stat. § 72A.20, subd. 9, 19. Unlike RICO, however, the ADA does not provide for extraordinarily punitive damages--treble damages, costs, and attorney fees-and therefore does not allow damages so substantial that they impair the regulatory scheme established by Minnesota state law. To the contrary, as both parties agree, Title III of the ADA does not provide for punitive damages. See 42 U.S .C. § 12188, § 2000a-3. The present case can therefore be distinguished from Doe v. Norwest Bank Minnesota and instead compared to National Association for the Advancement of Colored People v. American Family Mutual Insurance Company, 978 F.2d 287 (7th Cir.1992). In NAACP, the court held that the federal Fair Housing Act, which provides for a private cause of action, did not supersede, impair, or invalidate the substantively similar applicable Wisconsin statues which can only be enforced by administrative agencies. The court found that "in the main, federal regulation of a subject... does not prevent states from adding remedies to the arsenal established by federal law. The McCarran-Ferguson Act is a form of inverse preemption, so principles defining when state remedies conflict with ... federal law are pertinent in deciding when federal rules 'invalidate, impair, or supersede' state rules." Id. at 296. The court in NAACP held that as "duplication is not conflict" and that, as a general rule, "state and federal rules that are substantively identical but differ in penalty do not conflict with or displace each other," the McCarran-Ferguson Act did not bar plaintiff's Fair Housing Act claims. Id. at 295, 297. This Court finds the reasoning in NAACP persuasive and apposite to the present case and therefore holds that the McCarran-Ferguson Act does not "invalidate, impair, or supersede" the relevant Minnesota statutes and does not bar plaintiff's ADA claims.

IV. The Safe Harbor Provision

As indicated above, the ADA provides a Safe Harbor provision for insurance providers under the ADA. See supra, 42 U.S.C. § 12201(c). Under the Safe Harbor provision, the risk underwriting engaged in by insurance companies must be based on or not inconsistent with state law. Chabner, 994 F.Supp. at 1191. The subterfuge provision, see supra 42 U.S.C. § 12201(c), provides, however, that even if an insurer's practices are consistent with applicable state law, they can still violate the ADA if plaintiff demonstrates that the insurance policies are a subterfuge to evade the purpose of the ADA. See Doukas, 950 F.Supp. at 430. Thus, the Court must perform a two-part analysis to determine whether the IDS policies in question violate the Safe Harbor provision of the ADA: (1) is the eligibility criteria employed by IDS based on and consistent with state law; and (2) is the eligibility criteria a subterfuge to evade the purposes of the ADA.

*9 Minn.Stat. § 72A.20 provides in relevant part:

Subd. 9. Discrimination between individuals of the same class. Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any terms or conditions of such contract, or in any other manner whatever, or in making or permitting the rejection of an individual's application for accident or health insurance coverage, as well as the determination of the rate class for such individual, on the basis of a disability, shall constitute an unfair method of competition and an unfair and deceptive act or practice, unless the claims experience and actuarial projections and other data establish significant and substantial differences in class rates because of the disability.

Subd. 19. Support for underwriting standards. No life or health insurance company doing business in this state shall engage in any selection or underwriting process unless the insurance company establishes beforehand substantial data, actuarial projections, or claims experience which support the underwriting standards used by the insurance

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company. The data, projections, or claims experience used to support the selection or underwriting process is not limited to only that of the company. The experience, projections, or data of other companies or a rate service organization may be used as well.

Minn.Stat. § 72A.20, subd. 9, 19. IDS categorically denies long-term disability insurance to any applicant who has been treated for a mental health condition within the past year, allowing the applicant to be reconsidered after one year has passed since the last treatment. To comply with Minnesota law, IDS must justify such eligibility criteria with claims experience, actuarial projections, or other data to "establish significant and substantial differences in class rates because of the disability." Id. at subd. 9.

IDS asserts that it has presented such justification for its eligibility criteria and therefore does not violate state law. The Court acknowledges that IDS presents specific industry data based on claims experience and actuarial projections that show a dramatic increase in payments on long-term disability insurance claims due to mental health and nervous disorders. Plaintiff counters that while Defendant establishes that claims for disability due to mental or nervous conditions have increased since 1989, Defendant fails to demonstrate that individuals receiving treatment for mental or nervous conditions at or near the time of application for insurance are more likely to file claims under their long-term disability insurance. Furthermore, Plaintiff notes that the Paul Revere Underwriting Manual includes various impairments, such as dysthymia, and establishes procedures for processing applications from individuals with such impairments without recommending total denial of insurance for such applicants. Implicit in Plaintiff's observation is a challenge to the "substantial" actuarial data and claims experience presented by Defendant and their applicability to Plaintiff's situation. Thus, Plaintiff claims that a genuine issue of material fact exists as to whether IDS' long- term disability insurance eligibility criteria conforms to sound actuarial principles, claims experience, or substantial data as required by Minnesota state law. The Court agrees and denies summary judgment on the matter.

*10 Defendant also asserts that it is entitled to Safe Harbor protection under Title III of the ADA because its eligibility criteria are not a subterfuge. See supra, 42 U.S.C. § 12201(c). The issue of subterfuge arises only if it is determined that Defendant's practices are based on or not inconsistent with Minnesota law. As this Court has determined that a genuine issue of material fact exists as to whether IDS eligibility criteria violates Minnesota law, the Court need not pass on the issue as to whether the criteria is a subterfuge of the ADA.

V. Disability-Based Distinction Under the ADA

Plaintiff asserts that the IDS policy of denying long-term disability insurance to all applicants having received mental health treatment within the past year is founded on a disability-based distinction violative of the ADA. Courts have found that broad-based distinctions that distinguish between mental and physical health conditions do not qualify as illicit disability-based distinctions under the ADA because the ADA is only applicable to discrimination against disabled persons compared to non-disabled persons, not discrimination among the disabled. See Parker, 121 F.3d 1006 (the ADA prohibits discrimination between the disabled and non-disabled but does not mandate equality between individuals with different disabilities); see also Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985); Modderno v. King, 82 F.3d 1059 (D.C.Cir.1996); Traynor v. Turnage, 485 U.S. 535, 108 S.Ct. 1372, 99 L.Ed.2d 618; Ford v. Schering-Plough Corporation, 145 F.3d 601 (3rd Cir.1998). Furthermore, the EEOC, Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer Provided Health Insurance ("EEOC Interim Guidance"), [FN3] establishes the following:

Some employer provided health insurance plans ... [distinguish] between the benefits provided for the treatment of physical conditions on the one hand, and the benefits provided for the treatment of "mental/nervous" conditions on the other ... Such broad distinctions, which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability.

Krauel, 95 F.3d at 678 (citing EEOC Interim Guidance, (June 8, 1993), reprinted in Fair.Empl.Prac.Man. 405:7115, 7118(BNA)(footnote omitted)).

The aforementioned cases and the EEOC Interim

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Guidance, however, address disability-based discrimination among the disabled that affects the quality and extent of coverage offered to one class of disabled as compared to another and do not address the categorical denial of access to insurance coverage to a class of disabled individuals. When courts have addressed the exclusion of a class of disabled from an insurance plan, they have found such exclusions violative of the ADA. In Ford, 145 F.3d at 608, the Third Circuit held, "So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities" (emphasis added). See also Parker, 121 F.3d at 1015-16 ("because all the employees at Schering-Plough, whether disabled or not, received the same access to the long- term disability plan, neither the defendants nor the plan discriminated between the disabled and the able bodied"); EEOC v. CNA Ins. Companies, 96 F.3d 1039 (7th Cir.1996) (rejecting plaintiff's challenge to CNA's distinction between benefits for mental and physical illness on grounds that CNA did not discriminate because it offered its plan to everyone, did not charge higher prices to disabled-believing they might require more benefits-and did not vary terms of its plan depending on whether an applicant was able-bodied or disabled); Anderson v. Gus Maver Boston Store of Delaware, 924 F.Supp. 763 (E.D.Tex.1996)(finding that while the ADA allows some disability-based distinctions within insurance policies, when complete denial of coverage is at issue, disability based distinctions are impermissible).

*11 Legislative history of Title III of the ADA further supports the proposition that while disability-based distinctions in an insurance policy's terms are permissible under the ADA, a policy to deny insurance coverage categorically to mentally disabled is unacceptable:

> [W]hile a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section, the plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience....
>
> [T]his legislation could arguably find violative of its provisions any action taken by an insurer or employer which treats disabled persons differently under an insurance or benefit plan because they represent an increased hazard of death or illness.

S.Rep. No. 116, 101st Cong. 1st Sess. (1989), cited in Doukas, 950 F.Supp. at 428 (emphasis added); see also H.R.Rep. No. 101-485, pt. 2, at 136-137 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 419-420, cited in Doe, 999 F.Supp. at 1193; Chabner, 994 F.Supp. at 1191. This Court finds that as Defendant's policy of denying long-term disability insurance to those treated for mental conditions within the past year denies said individuals access to insurance coverage, the policy is founded on a disability-based discrimination violative of the ADA.

VI. Minnesota Human Rights Act

The Minnesota Human Rights Act ("MHRA"), Minn.Stat. § 363.01, subd. 13, defines disability in terms similar to those used in the ADA. The Minnesota District Court has held that federal precedent may be used to construe the MHRA and that analysis under the ADA controls a MHRA claim. Reiff v. Interim Personnel, Inc., 906 F.Supp. 1280, 1292 (D.Minn.1995)(citing Sigurdson v. Carl Bolander & Sons, Inc., 532 N.W.2d 225, 227 (Minn.1995); State, by Cooper v. Hennepin County, 441 N.W.2d 106, 110 (Minn.1989); Heise v. Genuine Parts Co., 900 F.Supp. 1137, 1153-54 (D.Minn.1995)). This Court's analysis of Plaintiff's claim under the ADA developed above is therefore also applicable to her MHRA claim.

A. Punitive Damages

Plaintiff seeks punitive damages under the MHRA. In order to recover punitive damages under the MHRA, Plaintiff must meet the standard set forth in Minn.Stat. § 549.20:

> Subd. 1. Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others.
>
> Subd. 3. Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the

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misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

*12 Minn.Stat. § 549.20, Subd. 1, 3. Considering the factors articulated in Minn.Stat. § 549.20, this Court finds as a matter of law that the eligibility criteria for IDS' long-term disability insurance does not demonstrate willful indifference to Plaintiff's rights and therefore does not warrant punitive damages. The Court therefore grants Defendant's motion for summary judgment on the matter of punitive damages.

ORDER

Accordingly, based on the foregoing and all the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

Defendant's motion for summary judgment is GRANTED as to plaintiff's claim for punitive damages under the MHRA and DENIED in all other respects.

FN1. Dysthymia is a mental condition characterized by mild, chronic depression that is treatable with medication and counseling and is recognized as a disorder in both the Diagnostic and Statistical Manual of Mental Disorders and Paul Revere Underwriting Manual. (Plaintiff's Mem. Opp. Summ. J. at 3).

FN2. The Doukas court noted that courts have avoided construing narrowly the "regarded as" definition of the ADA, citing Cook v. Rhode Island Dept. of Mental Health, Retardation, and Hosps., 10 F.3d 17 (1st Cir.1993), in which the court upheld a finding of perceived impairment based in part on an employer's fear that plaintiff's obesity created a heightened risk of future heart attack, and Doe v. New York Univ., 666 F.2d 761 (2d Cir.1981), in which the court held that NYU regarded plaintiff as impaired when it refused to readmit a plaintiff who it determined posed "an unacceptable risk to faculty, students, and patients." Doukas at *5 (citing Doe, 666 F.2d at 775).

FN3. The EEOC has not issued guidelines specifically addressing ADA application to long-term disability insurance.

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1/6/99

CERTIFICATE OF SERVICE

In the

Supreme Court of the United States

October Term, 1998

No. 98-529

COLLEEN V. FORD,

Petitioner,

- v –

SCHERING-PLOUGH CORPORATION,
SCHERING CORPORATION,
METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

I hereby certifiy that I am this day serving the foregoing document (1) copy upon the person(s) and in the manner indicated below. Service by federal express addressed as follows:

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